GEORGE TAN SOON-GIN

v.

HIS HONOUR JUDGE CAMERON & ANOR.

PRIVY COUNCIL (ON APPEAL FROM THE COURT OF APPEAL, HONG KONG)
LORD KEITH OF KINKEL
LORD JAUNCEY OF TULLICHETTLE
LORD BROWNE-WILKINSON
LORD MUSTILL
LORD SLYNN OF HADLEY
[PRIVY COUNCIL APPEAL NO. 10 OF 1992]
29 JUNE 1992

CRIMINAL PROCEDURE: *Trial - Stay of proceedings - Abuse of process - Delay in bringing proceedings - Powers of Subordinate Court to make an order on proceedings in progress in a superior Court.*

In August 1983, the Independent Commission Against Corruption (ICAC) received information and subsequently investigated a case involving illegal advantages received by an officer, one Mr. Turner, of Barclays (Asia) Ltd. from two companies. One of the companies was a Carrian company of which the appellant was the chairman. Investigation was postponed in order to avoid collision with the investigation of the Carrian case. Mr. Turner was eventually charged to which he pleaded guilty. In November 1989, some six years after the matter had come to light, the appellant was charged with two offences for offering an advantage to Turner. This case was popularly described as The Barclays (Asia) Case. Around the same time investigation into a transaction between Carrian company and a local affiliate of West Deutsche Landesbank Girozentrale (WestLB) begun. An official, Paul Kiang was arrested in September 1987 and was charged in June 1988. Not long after the appellant was also charged and this time with six offences. The prosecution of Mr. Kiang was carried on separately. He pleaded guilty. Then notice was given to the appellant of the intention to proceed with the charges. Both the cases, The Barclays (Asia) Limited and the "WestLB" was overshadowed by two other cases of public importance, that is, the Carrian case and the Bumiputra Malaysia Finance Ltd. (BMFL), in which the appellant was involved. The appellant along with other defendants were acquitted in the Carrian case. The prosecution of the BMFL case is at a standstill because of unusual obstacles faced by the prosecuting authorities. The appellant in the present case contended that the allegation was so old that it is an abuse of process now to bring them on trial. He also contended that the Barclays (Asia) Limited and West LB charges be postponed until after the BMFL case in order to avoid damage to the defence of the appellant. The application failed at the District Court. After a judicial review the High Court refused relief. In the appeal to the Court of Appeal it was decided that there was no jurisdiction to hear the matter. However, the Court of Appeal did give its opinion on the matter. Having been refused leave by the High Court, the appellant applied and was granted special leave by the Board.

Held:

[1] The Court of Appeal in Hong Kong has both a civil and criminal jurisdiction defined and limited by s. 3 of the Supreme Court Ordinance, Cap 4, Laws of Hong Kong. None of the instances in which criminal jurisdiction is conferred on the Court of Appeal by s. 13(3) is material in the present case. If a cause or matter is properly characterised as criminal, it cannot lose that character simply because at one stage it is carried forward by techniques which

closely resemble those employed in civil matters. In this circumstances the Court of Appeal was right to refuse jurisdiction. Any opinion on the merits of the appeal must necessarily be extra-judicial.

[2] The opinion of the Court of Appeal as to the manner in which a Court should exercise its exceptional jurisdiction to halt criminal proceeding is endorsed.

[3] A Judge of a subordinate jurisdiction has no power to make an order which directly governs the proceedings which not only are not before him but are in progress in a Court of superior jurisdiction.

[4] No absolute rule can be laid down as to the way a subordinate Judge should proceed. A number of factors need to be considered. In this case the District Judge did not proceed on false hypothesis.

[Appeal dismissed. Appellant ordered to pay respondent's costs before the Board.]

Cases referred to:
Amand v. Home Secretary [1943] AC 147 ***(cit)***
R. v. Southampton Justices, ex-parte Green [1976] QB 11 ***(cit)***
Day v. Grant [1987] QB 972 ***(cit)***
Carr v. Atkins [1987] QB 963 ***(cit)***
Re Smalley [1985] AC 622 ***(cit)***
Government of the United States of America v. Bowe [1990] 1 AC 500 ***(cit)***
Re A Firm of Solicitors [1990] 2 HKLR 146 ***(cit)***
R. v. Chief Registrar of Friendly Societies, ex-parte New Cross Building Society [1984] QB 227 ***(cit)***
Re Attorney-General's Reference (No. 1 of 1990) [1992] 3 WLR 9 ***(cit)***
Jago v. District Court of New South Wales [1989] 168 CRR 23 ***(cit)***
Connolly v. Director of Public Prosecutions [1964] AC 1254 ***(cit)***
Mills v. Cooper [1967] 2 QB 459 ***(cit)***
*Director of Public Prosecutions v. Humphreys [1977] AC 1****(cit)***
Hunter v. Chief Constable of West Midlands Police [1982] AC 529 ***(cit)***
R. v. Brentford Justices, ex-parte Wong [1980] 73 Cr App R 67 ***(cit)***
R. v. Derby Crown Court ex-parte Brooks [1984] 80 Cr App R 164 ***(cit)***
R. v. Heston-Francis [1984] QB 278 ***(cit)***
R. v. West London Stipendiary Magistrate ex-parte Anderson [1984] 80 Cr App R 143 ***(cit)***
R. v. Bow Street Stipendiary ex-parte Cherry [1989] 91 Cr App R 283 ***(cit)***
R. v. Telford Justices ex-parte Badhan [1991] 2 QB 78 ***(cit)***
R. v. Kray [1969] 53 Cr App R 412 ***(cit)***

Legislations referred to:
Court of Appeal Act [Bahamas], s. 23
Supreme Court Ordinance (Cap 4) [HK], ss. 3, 13(2), (2)(a), (3), 21K

Other source referred to:
Arehbold, Criminal Pleading and Practice, 4th. Edn., Paras. 4-45
Magna Carta, Clause 29

JUDGMENT

Lord Mustill:

This appeal is concerned with the pre-trial management of criminal prosecutions in Hong Kong. In circumstances which must be explained at a later stage the appeal is before the Board both by leave of the Court of Appeal in Hong Kong and by special leave granted by the Board itself. At the conclusion of the hearing the Board intimated that it would humbly advise Her Majesty that the appeal should be dismissed, for reasons which it would subsequently deliver. This they now do.

The Prosecutions

Although the appeal is directly concerned only with two groups of criminal charges, these cannot fairly be considered in isolation from two further and much graver groups of charges. Their Lordships must therefore begin by summarising the history of all four sets of proceedings, as it appears from the materials now before the Board.

(i) The Carrian Case

The present appellant, Mr. George Tan Soon-Gin was the chairman and prime mover of a group of companies, registered in Hong Kong, of which the most important was Carrian International Ltd. ("Carrian"). By the early 1980's these had come to occupy a central position in the commercial life of Hong Kong, with businesses in widely dispersed fields, financed on a great scale by advances from institutional investors. When the Carrian empire abruptly collapsed in 1983 the outcome was what has been described as the greatest financial disaster to afflict Hong Kong for at least forty years. Enormous sums have been lost, and the repercussions are still being felt today. These events led to a series of criminal investigations into the affairs of Carrian which began soon after the demise of the companies and culminated in the laying of charges against the appellant and others. The details are immaterial, and it is sufficient for present purposes to say that they were concerned with two subjects, namely the accounts of Carrian and a building called Gammon House. The decision was taken to try these two matters separately, and the trial of the charges relating to an alleged conspiracy as to the accounts was taken first. This trial began in February 1986 and ended some seventeen months later, when the trial Judge acceded to a submission that the evidence for the prosecution had raised no case to answer, and directed the jury to acquit all the defendants. After an interval for reflection the prosecuting authorities elected to offer no evidence in relation to the Gammon House affair.

The Carrian proceedings, at their various stages, were current for the whole of the five years between 1983 and 1988. Without doubt they occupied enormous resources of time, energy and funds for prosecutors and defendants alike.

(ii) The BMFL Case

Bumiputra Malaysia Finance Ltd. ("BMFL") is a wholly-owned Hong Kong subsidiary of Bank Bumiputra Malaysia Bhd., an important bank, owned and controlled by the Malaysian Government. Mr. Lorrain Osman was a director of BMFL. Other officials were Mr. Shamsudin and Dr. Saniman. Between 1979 and 1983 very large advances were made by BMFL to Carrian. After the collapse of Carrian suspicions arose about the propriety of these advances, and ultimately a series of very grave charges were laid upon the appellant and various officers of BMFL, including Mr. Osman. The charges against the appellant, in what became Case No. 5424 of 1985, comprised nine counts of conspiracy to defraud and 14 counts of bribing officials of BMFL. These charges were first laid in December 1985. Throughout the six years which have intervened these charges have remained in the magistracy, the subject of successive remands. No indictment has yet been preferred. For the first few years the remands were unopposed, since it would plainly have been inappropriate to proceed against the appellant whilst the Carrian prosecution was still afoot. From 1990 however those representing the appellant have opposed further remands, but without success, and the prosecution of the BMFL charges is currently at a standstill.

The reasons for this most unusual state of affairs become clear, as soon as one looks at the history of the proceedings against Mr. Osman, who, if an indictment against him is preferred, will become a co-accused of the appellant. As was the case with others alleged to be implicated in this affair he left the Colony, and has not yet returned, notwithstanding strenuous

efforts on the part of the prosecuting authorities. It is unnecessary to give more than the following sketch of the widespread litigation which has attended the efforts made to bring this case to trial.

1. A warrant for the arrest of Mr. Osman was issued in November 1985, at a time when he was in London. The process to extradite him to Hong Kong commenced in May 1986, and continued until June 1987, when after a long hearing the Metropolitan Stipendiary Magistrate committed him to prison to await an order from the Home Secretary to return to Hong Kong. There followed a series of seven applications to the Divisional Court in England, coupled in some instances with applications for judicial review, each application being launched upon the failure of the last, and each pursued unsuccessfully by way of petition to the House of Lords for leave to appeal. Certainly nothing in the recent history, and very probably nothing in the ancient history, of what were once the prerogative writs, has been seen to match this stream of applications. The sixth application was dismissed as an abuse of the process of the Court in November 1991, and directions were made about the procedures to be adopted in future applications. Another application was not long in coming, on this occasion for *habeas corpus* coupled with judicial review. It met the same fate as its predecessors. A petition for leave to appeal is now pending before the Appellate Committee of the House of Lords.
2. Since 1987 Mr. Osman has launched two complaints before the European Commission of Human Rights. Both have been rejected, the second in 1991.
3. During the same period Mr. Osman has pursued applications for judicial review in Hong Kong. With one exception these have failed; and the exception appears to have had no lasting effect on the course of the proceedings.
4. Meanwhile, since 1985 attempts have been made by the prosecution, against the most strenuous objections from Mr. Osman and the appellant, to take evidence in Malaysia pursuant to letters of request. Their Lordships do not have the details, but it does seem that at least some evidence has been obtained in this way, subject no doubt to objection at the trial.
5. Similar efforts were made to obtain evidence from Switzerland and the United States of America. Nothing is known as to what has happened in Switzerland, but it does appear that in the United States, after a long course of litigation, the attempts have failed.
6. Mr. Shamsudin, who had been abroad, returned to Hong Kong during 1986. He pleaded guilty to two counts of conspiracy and two of corruption, and received what became, after review, a long term of imprisonment.
7. Dr. Saniman, who had made his way to France, did not return. Efforts to procure his extradition, which have been going on for five years, and which seemed for a time to have been successful, have now been thwarted, at least for the moment.

This sketch may serve to show what obstacles the prosecuting authorities have experienced in bringing the BMFL case to trial, and how hard it is to predict when the trial will eventually occur, and what form it will then take. What is clear, however, is that any trial, whether or not Mr. Osman takes part, will be long and complex; more so even than the Carrian trial.

(iii) The Barclays (Asia) case

During August 1983 the Independent Commission Against Corruption ("ICAC") received information that Mr. Stuart Leslie Turner, an officer of Barclays (Asia) Ltd., had received illegal advantages from two companies, one of which was a Carrian company. ICAC decided

to postpone enquiries, to avoid collision with another agency which was investigating the affairs of Carrian, but eventually Mr. Turner was charged with, pleaded guilty to and was sentenced to imprisonment for, a total of four charges arising from these transactions. It is evident that the prosecuting authorities also had in mind to prosecute the appellant for implication in some of Mr. Turner's offences, but a decision was taken in 1988, and communicated to the appellant's solicitors, that proceedings would be put back until after the BMFL trial. At this time it was believed that the return of Mr. Osman to Hong Kong was imminent. When this expectation was disappointed it was decided to press forward with the Barclays (Asia) prosecution. Thus it happened that in November 1989, more than six years after the matter had first come to light, he was charged with two offences of offering an advantage to Mr. Turner, contrary to the Prevention of Bribery Ordinance, Cap. 201 of the Laws of Hong Kong. The trial of these charges was subsequently fixed for June 1992, with an estimated duration of nine weeks, and in the light of the advice already given by this Board in relation to the appeal, it is now in progress.

(iv) The WestLB Case

During February 1987 ICAC began to investigate transactions between Carrian and the local affiliate of West Deutsche Landesbank Girozentrale ("WestLB"), another banking organisation. In September 1987 an official of WestLB, Paul Kiang, was arrested although it seems that he was not actually charged until June 1988. Not long afterwards, the appellant was also charged, on this occasion with six offences, alleged to have been committed between October 1981 and June 1982, of bribing officials of WestLB, including Mr. Kiang. Although the two co-accused were initially remanded together, the prosecution of Mr. Kiang ultimately went ahead separately. He pleaded not guilty, but on 2 May 1989 was convicted and sentenced to imprisonment. The Attorney General then gave notice that he intended to proceed with the charges against the appellant.

The Proceedings in Hong Kong

The general shape of these events is clear enough. The combination of the Carrian collapse with the emergence of the BMFL irregularities presented the investigating and prosecuting authorities of Hong Kong with massive tasks, which must have stretched resources to the limit. Given the great public importance attached to these two matters it was inevitable that they should receive priority over the Barclays (Asia) and WestLB allegations, serious as the latter undoubtedly were. Both logistically and procedurally it would be impossible for all four cases to be pursued to trial at the same time, and it was therefore natural for the Barclays (Asia) and WestLB matters to be placed in relative suspense, whilst attention was concentrated on Carrian and BMFL.

The authorities were then faced with two quite unforeseen events: the utter failure of the Carrian prosecution and the successive reverses suffered in their attempts to have Mr. Osman returned to Hong Kong for a trial of BMFL, with the appellant as co-defendant. Given the setbacks encountered in the really big cases it is understandable that the authorities now wish to make some headway as regards the Barclays (Asia) and WestLB accusations which, although dwarfed by comparison with Carrian and BMFL, were nevertheless concerned with really serious offences: as witness the long sentences imposed on those who have been dealt with on kindred matters.

To this the appellant and his advisers respond that however understandable the authorities' current attitude may be the course which they are adopting is unfair, for two cumulative reasons.

First, because the Barclays (Asia) allegations are so old - and so unnecessarily old - that it would be an abuse of process now to bring them to trial.

Secondly, because to try the Barclays (Asia) and WestLB charges at the present stage would do inevitable damage to the defence of the appellant when the very grave charges relating to BMFL come to be heard. The right course, so the argument runs, is to do what the Attorney General would have done but for the reverses suffered in the extradition proceedings, namely to postpone the Barclays (Asia) and WestLB trials until BMFL is out of the way.

To put these contentions into effect the appellant made two applications in the District Court to which the cases had been transferred. First, for a perpetual stay of the Barclays (Asia) prosecutions. Secondly, for an order that the trials of the Barclays (Asia) and WestLB charges should be postponed until the conclusion of the BMFL trial. These applications failed.

The appellant then applied to the High Court for judicial review of these decisions. On 13 May 1991 Barnett J in a reasoned judgment refused relief.

Next, the appellant appealed to the Court of Appeal against the decision of Barnett J. During the argument of the appeal the question arose whether the Court of Appeal had any jurisdiction to hear it, under the empowering legislation, given the criminal origins of the proceedings in suit. The Court ruled that there was indeed no jurisdiction, and on this ground dismissed the appeal. Nevertheless the Court went on to discuss in some detail what the position would have been if the appeal could properly have been entertained, expressing the opinion that:

(i) (Silke V.P. differing) there was no ground to intervene in the Barclays (Asia) case; and

(ii) (all members of the Court concurring) there was no ground to intervene as regards the order in which the cases should be decided.

Against this decision the appellant sought and obtained leave to appeal to Her Majesty in Council, but since there was an issue both as to the jurisdiction of the Court of Appeal to hear the appeal from Barnett J, and as to the power of that Court to grant onward leave, the appellant also applied to Barnett J himself for leave to appeal direct. This being refused he applied to the Board, and on 5 February 1992 the Board granted special leave.

The Jurisdiction of the Court of Appeal

Since there is no doubt that an appeal is now properly before the Board it was suggested that the question whether the Court of Appeal was right to decline jurisdiction has become academic, and subject to one qualification their Lordships agree. Nevertheless, since the subject is of some general importance in Hong Kong the Board was invited to express an opinion upon it.

The Court of Appeal in Hong Kong has both a civil and a criminal jurisdiction, each defined and limited by s. 3 of the Supreme Court Ordinance, Cap. 4, Laws of Hong Kong. It is common ground that none of the instances in which criminal jurisdiction is conferred on the Court of Appeal by s. 13(3) is material to the present case. It is also common ground that, if the Court is to have civil jurisdiction under s. 13(2) in a case such as the present, this must be by virtue of s. 13(2)(a), which reads as follows:

13(2) The civil jurisdiction of the Court of Appeal shall consist of:

(a) appeals from any judgment or order of the High Court in any civil cause or matter.

The question is thus whether the proceedings before Barnett J constituted a civil cause or matter. The interpretation for which both the appellant and the Attorney General contended before the Court of Appeal was that the answer was affirmative; either because the proceedings for *habeas corpus* were so firmly imprinted with a civil character that they were to be treated as civil, notwithstanding the essentially criminal nature of the proceedings from which they arose, or because they were of an indeterminate nature, which s. 13(2)(a) was wide enough to embrace. The Judges of the Court of Appeal, by contrast, took the view that the proceedings before Barnett J, being concerned only to review the order of Judge Cameron and having no independent existence of their own, took their character from the entirely criminal nature of that order.

The question is not new, and has previously been considered by Courts in England and Hong Kong. It is convenient to begin with the more important of the English cases.

The first is *Amand v. Home Secretary* [1943] AC 147. The appellant, who had been conscripted whilst in England into the Netherlands armed forces was alleged to be absent without leave. Pursuant to an order made under the Allied Forces Act he was arrested by the Metropolitan Police. He applied for *habeas corpus* on the ground that he did not fall within the scope of the order. The Divisional Court refused the application. When he sought to appeal, a preliminary objection was raised that an appeal did not lie, as the appeal was in a "criminal cause or matter" in respect of which the Court of Appeal had at that time no jurisdiction. On appeal to the House of Lords it was held that the objection was well-founded.

After pointing out that the distinction between cases of *habeas corpus* in a criminal matter, and cases where the matter is not criminal goes back very far, Viscount Simon LC said (at p. 156 of the report):

> It is the nature and character of the proceeding in which *habeas corpus* is sought which provide the test. If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a Court claiming jurisdiction to do so, the matter is criminal. ... The proceedings in the present case are for the direct purpose of handing the appellant over so that he may be dealt with on these charges. Whether they are hereafter withdrawn or disproved does not affect the criminal character of the matter in the least ...

So also Lord Wright (at p. 159):

> The words 'cause or matter' are, in my opinion apt to include any form of proceeding. The word 'matter' does not refer to the subject-matter of the proceeding, but to the proceeding itself. It is introduced to exclude any limited definition of the word 'cause'. In the present case, the immediate proceeding in which the order was made was not the cause or matter to which the section refers. The cause or matter in question was the application to the Court to exercise its powers under the Allied Forces Act and the order, and to deliver the appellant to the Dutch military authorities. It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter. That was the matter of substantive law. The writ of *habeas corpus* deals with the machinery of justice, and is essentially a procedural writ, the object of which is to enforce a legal right. ... The principle which I deduce from the authorities I have cited and the other relevant authorities which I have considered, is that if the cause or matter is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment, such as imprisonment or fine, it is a 'criminal cause or matter'. The person charged is thus put in jeopardy. Every order made in such a cause or matter by an English Court, is an order in a criminal cause or matter, even though the order, taken by itself, is neutral in character and might equally have been made in a cause or matter which is not criminal.

Amand v. Home Secretary was the subject of a number of decisions in the Court of Appeal. One of these, *R. v. Southampton Justices, Ex parte Green* [1976] QB 11, has been a source of problems which perhaps have yet to be resolved at the highest level. Even, however, if it was rightly decided, it is remote from the present issue, since it proceeded on the basis that the giving of surety for a defendant's bail created something in the nature of a civil debt. Much more directly in point is *Day v. Grant* [1987] QB 972 (note), which was concerned with attacks upon witness summonses, in one instance by way of judicial review, and in the other by order of a High Court Judge. The Court of Appeal held that no appeal lay in such a case. After citing passages from *Amand* Sir John Donaldson MR, with whose judgment Kerr and Lloyd LJJ agreed, observed that he could not think of a case in which the order appealed from arose more clearly in a criminal cause or matter. Returning to the same topic in *Carr v. Atkins* [1987] QB 963, in the light of the intervening decision of the House of Lords in *Re Smalley* [1985] AC 622, the Master of the Rolls expressed no doubt whatsoever that an order or a refusal of an order by a criminal Judge for the production of documents under the Police and Criminal Evidence Act 1984 was properly described as an order in a criminal cause or matter.

Reference must also be made to a brief but important statement by the Privy Council, in the course of an elaborate opinion, largely concerned with other matters, in *Government of the United States of America v. Bowe* [1990] 1 AC 500. A fugitive was the subject of extradition proceedings in the Bahamas. An order was made against which he sought recourse in the Supreme Court. An attempt was then made to pursue an onward appeal to the Court of Appeal. Amongst the points in issue was the question whether, if the appeal was validly brought, the Court had jurisdiction to make an order for costs. On a further appeal to the Privy Council the Board held that, if jurisdiction existed at all, it must have been under a section of the relevant Bahamas legislation (s. 23 of the Court of Appeal Act) which provided that:

> No costs shall be allowed by the Court on either side in connection with the hearing and determination of an appeal in any criminal cause or matter ...

In the course of rehearsing the facts Lord Lowry, who delivered the opinion of the Board stated at p. 528 that:

> The appeal proceedings were intituled on the civil side of the Court (although their Lordships have no doubt that they were proceedings in a criminal cause or matter) ...

Later, his Lordship cited *Amand*, and in particular one of the passages from the speech of Viscount Simon quoted above, as clear authority for the view that the proceedings were in a criminal cause or matter. The opinion of the Board concluded as follows at p. 535:

> Ultimately the question for decision admits of, and indeed demands, a simple answer. The *certiorari* and prohibition proceedings constituted a criminal cause or matter, as would a *habeas corpus* application if the subject matter were criminal in the sense described in *Amand v. Home Secretary* ...

Their Lordships turn to the authorities in Hong Kong, where there is a conflict of judicial opinion. The first case for mention is *re a Firm of Solicitors* [1990] 2 HKLR 146. A warrant authorised officers of ICAC to enter and search certain premises. The occupiers complained by way of judicial review that the warrant lacked particularity. It is noteworthy that the application sought relief in the shape of a declaration, injunctions and damages. The Judge in the High Court granted part of the relief claimed. ICAC sought to appeal, and the occupiers contested the jurisdiction of the Court of Appeal, on the ground that the order of the Judge was not made in a civil cause or matter. In a judgment delivered by the late Hunter JA the

Court rejected this argument. First, the judicial history in England was examined and explained by reference to legislative circumstances for which there was no parallel in Hong Kong. Looking at s. 13 of the Supreme Court Ordinance, the question in issue should be answered by considering the nature of the cause and of the relief sought and granted. Scrutiny of s.21K of the Supreme Court Ordinance, which introduced the radical changes in procedure of O. 53, and to the peculiarly civil remedies of injunction, declaration and damages, pointed (in the opinion of the Court) irresistibly to the conclusion that the proceedings were civil. It seemed to the Court that in its current form the civil components of the process of judicial review were so strong that an application which claimed the civil relief authorised by s. 21K was to be regarded as a civil cause or matter. This was sufficient to determine the issue, but the Court went on to say at p. 151:

> The second question is whether this conclusion applies to all applications for judicial review. We think there is very strong ground for saying that it does, and that by recognising both potential criminal origins in s. 211 and then by channelling all judicial review applications together by s. 21K under O. 53, the legislature was providing for all ...

Subsequently, during the argument of the appeal in the present case, the same point came before a Court of Appeal, differently constituted, in *Attorney-General v. Alick Au Shui Yuen* [1991 No. 149] - judgment delivered on 3 October 1991 - in which the Court disagreed with the conclusion and *dicta* in *re a Firm of Solicitors.* This Court had the advantage, denied to the previous Court, of a reference to *Government of the United States v. Bowe, supra.* The Court attached great weight to the advice delivered by Lord Lowry, and in particular to the final paragraph already quoted. Cons V.P., concluded the judgment of the Court as follows:

> We are confident that had these words [those of Lord Lowry] been brought to the attention of the other division it would have taken the view that we do today.

Finally, there was the decision of the Court of Appeal in the present case, where the point was considered in great detail in the judgment of Silke V.P., by reference to a full range of reported cases (only a few of which have been cited herein), and also to the details of the procedures for judicial review in Hong Kong. In the result he concluded that:

> ... this Court, when the root is criminal, cannot have conferred upon it, by that root growing in some transmuted fashion a civil tree, an appellate jurisdiction which, in my judgment, the terms of the legislation do not permit. ... While the whole scheme of the judicial review sections of the Supreme Court Ordinance is couched in terms of civil proceedings I do not accept that it is right to ignore the nature of the cause from which those applications spring.

Their Lordships have no doubt that the approach of the Court of Appeal in the present case was right. The language of the Ordinance directs attention, not to the proceedings which led to the order from which the appeal is brought, but to the nature of the cause or matter "in" which the appeal is brought. If the cause or matter is properly characterised as criminal, it cannot lose that character simply because at one stage it is carried forward by techniques which closely resemble those employed in civil matters, or which lead to relief often granted in civil matters, or which are available in civil or criminal matters alike; any more than, having gained this new character by the employment of such techniques, it would revert to its former status when the deployment of the techniques came to an end. The position is surely much simpler than this. Nobody could doubt that the applications made by the appellant to the District Judge were applications in a criminal cause, for their purpose was to determine the way in which the prosecution should proceed. The purpose of the judicial review was to

dispose of the District Judge's order so as to permit the substitution by the reviewing Court of a different order, still directed to the way in which the matter should proceed. Whatever the position may be as regards the kind of procedure, ancillary to a criminal matter, such as the estreatment of surety considered in *R. v. Southampton Justices, ex parte Green (supra)*, everything happening in the present case has been no more than one stage in a continuing contest between the prosecutor and the appellant in a matter which from the outset has been exclusively criminal in nature.

In these circumstances their Lordships consider that the Court of Appeal was right to decline jurisdiction. Two consequences follow. First, that the appeal with which the Board is concerned is that brought by special leave from the decision of Barnett J. Secondly, whilst their Lordships fully understand why the Court of Appeal should have wished to state its opinion on the questions argued, any observations concerning the merits of an appeal which should not be before the Court must necessarily be extra-judicial. The Board will, at the concluding stage, test its own opinions against those of Judges with long judicial experience in Hong Kong. Nevertheless, their Lordships think it right to concentrate attention on the reasons given by Barnett J for the order now under appeal.

The Barclays (Asia) Appeal

Their Lordships turn to the first of the orders under appeal, namely the order of Barnett J refusing to overturn the decision of Judge Cameron not to grant a perpetual stay of the Barclays (Asia) prosecution.

It is important to emphasise at the outset the magnitude of the task which the appellant has set himself by this appeal. Although the jurisdiction to stay a pending prosecution is undoubted, it is equally beyond doubt that the discretion to prevent a prosecution from going to trial should be very sparingly exercised. To this must be added the further obstacle, that the application to Barnett J was not in the nature of an appeal against the conclusion of the District Judge, but as (as the learned Judge reminded himself) a review of the decision-making process, to be performed within narrow limits. As Griffiths LJ emphasised, in *R. v. Chief Registrar of Friendly Societies, ex parte New Cross Building Society* [1984] QB 227, at p. 260, in relation to the duties of a Court seized of an application for judicial review:

> The Court must take a broad view of the decision and not allow itself to be bogged down in minutiae, or led into the error of taking over the role of a fact finding tribunal ... Particular care must be taken before stigmatising a decision as one at which no reasonable person could have arrived, for this is coming dangerously close to the Court substituting its own discretion for that of the tribunal.

Finally, the appeal to the Privy Council encounters a further hurdle, in the shape of the long-established reluctance of the Board to interfere where the appeal is brought by special leave, except in cases of a serious miscarriage of justice, a reluctance which is even greater where the appeal is concerned with matters of procedure.

Very properly there was extensive discussion in the judgments of Barnett J and the Court of Appeal of the English decisions on this recently-developed aspect of criminal procedure. This citation was repeated before the Board, but with the very important addition of *Re. Attorney General's Reference (No. 1 of 1990)* [1992] 3 WLR 9, judgment in which was delivered by the Court of Appeal (Criminal Division) while the present appeal awaited a hearing. At the time of argument before the Board only an abbreviated account of the judgment, reported in *The Times* newspaper, was available for consideration. Subsequently, their Lordships have had sight of the approved transcript of the judgment which corresponds in all material respects with the report considered in argument.

The facts of *Attorney General's Reference No. 1 of 1990* are of no consequence for present purposes. It is however important to note the two questions which were referred to the Court of Appeal for consideration:

(i) Whether proceedings upon indictment may be stayed on the grounds of prejudice resulting from delay in the institution of those proceedings even though that delay has not been occasioned by any fault on the part of the prosecution.

(ii) If the answer to (i) above is in the affirmative, what is the degree of: (a) the likelihood and (b) the seriousness of any prejudice which is required to justify a stay of such proceedings.

After setting out the facts, the judgment of the Court of Appeal, delivered by Lord Lane CJ, first dealt with and dismissed an argument for the respondent based on Clause 29 of Magna Carta, similar to one which had been advanced before the High Court of Australia in *Jago v. District Court of New South Wales* [1989] 168 CRR 23. No such argument has been advanced in the present case, and their Lordships need say nothing about it. The Court went on to cite a series of authorities for supporting a general jurisdiction to prevent a misuse of the process of the Court. These were *Connolly v. Director of Public Prosecutions* [1964] AC 1254, *Mills v. Cooper* [1967] 2 QB 459, *Director of Public Prosecutions v. Humphreys* [1977] AC 1, *Hunter v. Chief Constable of the West Midlands Police* [1982] AC 529 and *R. v. Brentford Justices, ex parte Wong* [1980] 73 Cr App R 67.

The Court continued at p. 16:

> However, the most usual ground is that based on delay, that is to say the lapse of time between the commission of the offence and the start of the trial. The number of applications based on this ground has increased alarmingly over the past few years.

The Court then proceeded to discuss two groups of authorities. The first included *R. v. Derby Crown Court ex parte Brooks* [1984] 80 Cr App R 164 and *R. v. Heston-Francois* [1984] QB 278, from the judgments in which the Court of Appeal quoted with approval. The second was called up by reference to para. 4-45 to the current (44th) edition of *Archbold, Criminal Pleading and Practice.* These cases included *R. v. West London Stipendiary Magistrate ex parte Anderson* [1984] 80 Cr App R 143, *R. v. Bow Street Stipendiary ex parte Cherry* [1989] 91 Cr App R 283, and *R. v. Telford Justices ex parte Badhan* [1991] 2 QB 78. After this citation of authority, the Court of Appeal drew attention to an apparent discrepancy between the stricter rule applied in the earlier cases, and that to which the later decisions appear to have given effect. The Court of Appeal then set out its own opinion on the matter, which it is convenient now to set out at length:

> One therefore reaches the anomalous situation whereby the earlier and stricter rule has been broadened, so it seems, by the weight of subsequent decisions. On the basis of the decision in *R. v. Telford Justices ex parte Badhan* [1991] 2 QB 78, Mr. Hooper, appearing before us on behalf of the Attorney General, felt constrained to concede that the answer to the Attorney General's first question is a qualified 'yes'. As it is not possible to anticipate in advance all the infinitely variable circumstances which may arise in the future, we feel ourselves, albeit reluctantly, forced to agree to a limited extent with that concession.
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> However, we remind ourselves of the principles outlined earlier in this judgment and the observation of Lord Morris in *Connolly* (*op. cit.*) at p. 1304 that 'Generally speaking a prosecutor has as much right as a defendant to demand a verdict of a jury on an outstanding indictment, and where either demands a verdict a Judge has no jurisdiction to stand in the way of it'.

> Stays imposed on the grounds of delay or for any other reason should only be employed in exceptional circumstances. If they were to become a matter of routine, it would be only a short time before the public, understandably, viewed the process with suspicion and mistrust. We respectfully adopt the reasoning of Brennan J in *Jago v. District Court of New South Wales & Ors.* [1989] 168 CLR 23.
>
> In principle, therefore, even where the delay can be said to be unjustifiable, the imposition of a permanent stay should be the exception rather than the rule. Still more rare should be cases where a stay can properly be imposed in the absence of any fault on the part of the complainant or prosecution. Delay due merely to the complexity of the case or contributed to by the actions of the defendant himself should never be the foundation for a stay.
>
> In answer to the second question posed by the Attorney General, no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer prejudice to the extent that no fair trial can be held: in other words, that the continuance of the prosecution amounts to a misuse of the process of the Court. In assessing whether there is likely to be prejudice and if so whether it can properly be described as serious, the following matters should be borne in mind: first, the power of the Judge at common law and under the Police and Criminal Evidence Act 1984 to regulate the admissibility of evidence; secondly, the trial process itself, which should ensure that all relevant factual issues arising from delay will be placed before the jury as part of the evidence for their consideration, together with the powers of the Judge to give appropriate directions to the jury before they consider their verdict.
>
> It follows from what we have said that in our judgment the decision of the Judge to stay the proceedings in the instant case was wrong. The delay, such as it was, was not unjustifiable; the chances of prejudice were remote; the degree of potential prejudice was small; the powers of the Judge and the trial process itself would have provided ample protection for the respondent; there was no danger of the trial being unfair; in any event the case was in no sense exceptional so as to justify the ruling.
>
> This judgment will, we hope, result in a significant reduction in the number of applications to stay proceedings on the ground of delay. At the risk of repetition, we emphasise the exceptional nature of the jurisdiction. In the event of an unsuccessful application to the Crown Court on such grounds, the appropriate procedure will be for the trial to proceed in accordance with the ruling of the trial Judge and, if necessary, the point should be argued as part of any appeal to the Court of Appeal (Criminal Division).

Their Lordships endorse this statement of the manner in which the Court should exercise its exceptional jurisdiction to halt criminal proceedings and, except in one respect, they prefer not to offer for their own account any further exploration of the prior authorities.

This exception relates to what became, on the argument before the Board, the principal ground advanced by the appellant in support of the permanent stay of the Barclays (Asia) proceedings. It is most conveniently illustrated by the following passage from the judgment of the Divisional Court in *R. v. Bow Street Stipendiary, ex parte Cherry, supra*, at p. 296:

> Obviously, what has to be demonstrated to the Court is that the delay complained of has produced genuine prejudice and unfairness. In some circumstances as the cases show, Mr. Lawson referred to them in his skeleton argument, prejudice will be presumed from substantial delay. Where that is so it will be for the prosecution to rebut, if it can, the presumption. He contended that in the absence of a presumption where there is substantial delay it will be for the prosecution to justify it. He went further and said that the prosecution bore that burden whenever the issue of prejudice through delay was raised. We have no difficulty in accepting the former ...

It seems that this passage led Barnett J (and indeed the Court of Appeal) to conclude that the District Judge should have approached the enquiry on the footing that (i) the burden of showing that the continuance of the prosecution would be a misuse of the process of the Court rested upon the appellant, but (ii) this burden could *prima facie* be discharged by demonstrating an inexcusably long delay, unless the prosecution could in turn discharge the burden of showing that prejudice did not in fact follow from the delay. Barnett J went on to hold that the District Judge had mistakenly overlooked the reversal of the burden of proof at the second stage but that this had not vitiated his assessment of the material and arguments, nor his arrival at the correct conclusion that the prosecution had discharged the burden thus placed upon it.

Their Lordships do not agree with this appreciation of the law. Naturally, the longer the delay the more likely it will be that the prosecution is at fault, and that the delay has caused prejudice to the defendant; and the less that the prosecution has to offer by explanation, the more easily can fault be inferred. But the establishment of these facts is only one step on the way to a consideration of whether, in all the circumstances, the situation created by the delay is such as to make it an unfair employment of the powers of the Court any longer to hold the defendant to account. This is a question to be considered in the round, and nothing is gained by the introduction of shifting burdens of proof, which serves only to break down into formal steps what is in reality a single appreciation of what is or is not unfair.

Thus, whilst their Lordships entirely understand why both Barnett J and the Court of Appeal should have felt, in the light of the passage cited from *re. Cherry*, *supra*, that the District Judge had paid insufficient regard to the task undertaken by the prosecution, they consider that the District Judge was in fact correct to take into account all the factors together, without reference to any burden of proof other than the heavy burden which always rests on a defendant who seeks a stay on the grounds of delay.

This conclusion serves to dispose of the only question of principle raised in relation to the Barclays (Asia) prosecution. All that is left is the complaint about the way in which the District Judge assessed the fault of the prosecution for the delay, the expectations aroused by a supposed assurance given on behalf of the prosecutor that the Barclays (Asia) charges would not be pursued and the undoubted ill-health of the appellant. Their Lordships abstain from detailed discussions of these questions, in so far as they were developed in argument, for that would lead the Board to fall into precisely the errors against which Griffiths LJ gave warning in the passage cited above, and which Barnett J clearly set himself to avoid. All their Lordships need to say is that having carefully considered the arguments advanced, in the manner indicated by Griffiths LJ, they can see no ground upon which Barnett J would have been justified in taking the decision-making power out of the hands of the District Judge, and substituting a decision of his own.

The Order of Trials

There remains the question whether, as the appellant contends, the only proper course for the District Judge was to postpone the trials of the Barclays (Asia) and WestLB matters until after the conclusion of the BMFL trial, or at least postpone them until it had become clear whether, and if so when and in what shape, the BMFL case would proceed.

It is necessary first to consider an argument which has throughout been presented by the respondent as decisive; namely, that the answer to this question must inevitably be negative because the District Judge had no power, or no power that he could properly exercise, to do

anything other than proceed with the cases assigned to his Court, without any regard at all to the pendency of the BMFL prosecution, destined for committal to the High Court. The history of this proposition is not altogether clear. The District Judge was undoubtedly aware of it, since it features in his lengthy rehearsal of the arguments, but he did not refer to it when he came to give reasons for his ruling, which was based exclusively on an examination of the merits. From a brief and rather difficult passage in his judgment, it seems that Barnett J was disposed to consider that the submission was correct, but it evidently served only to underline his reasons for concurring with the District Judge. However this may be, it is plain that the District Judge must have tacitly rejected the argument. Their Lordships have no doubt that he was right to do so, for although it is obvious that a Judge of subordinate jurisdiction has no power to make an order which directly governs the proceedings which not only are not before him but are in progress in Court of superior jurisdiction, the proposition that, when deciding what course to take as regards the furthering of the proceedings which are before him, he is forced to ignore the other proceedings entirely, is in their Lordships' opinion quite unsustainable. Although he can do nothing directly about them, the existence of the concurrent proceedings is an element, albeit not necessarily decisive, in the assembly of facts by reference to which the Judge of subordinate jurisdiction must decide how in the interests of justice to exercise his powers to regulate the proceedings in his Court.

No absolute rule can be laid down as to the way the subordinate Judge should proceed. Everything will depend on the circumstances. These will include the relative gravity of the offences alleged in the two sets of proceedings; the degree of prejudice which the defendant may suffer, in the shape of adverse publicity or in other respects, if the lesser matters are brought to trial first; the likely time-spans of the two sets of proceedings; the possibility of hardship to the defendant in being required to divert attention and resources to the defence of the lesser charges whilst the graver are in preparation; the risk that if the lesser charges are postponed the lapse of time may render a fair trial of them more difficult; the desirability in the public interest of ensuring that charges properly brought are pressed to a conclusion. These are only examples; other factors may come into play in a particular case.

Leaving aside, therefore, the proposition that the District Judge had no choice in the matter, it must be asked whether there is any sufficient reason to interfere with the choice which he actually made. The principal ground urged on behalf of the appellant was that the District Judge had been misled by Counsel then appearing for the Attorney General into the belief that there was no real prospect that the BMFL prosecution of the appellant would go ahead, and that accordingly there could be no objection to pressing forward with the lesser charges. As to what Counsel said there is a keen dispute which their Lordships cannot resolve, beyond observing that there is nothing in the abbreviated note of the arguments in the District Court to suggest that Counsel went further than to point out that the immediate future of the BMFL prosecution was highly speculative. This question need not however be pursued since, whatever Counsel may have said, it is plain that the District Judge did not proceed upon a false hypothesis. The argument for the appellant fastens on the words "I understand and accept that in refusing this application this may give rise to problems should the BMFL charges come to trial ...". Reading this part of the judgment as whole, however, it is clear that the District Judge was doing no more than taking note of the fact that whereas the proceedings before him were ready for trial the future of the BMFL prosecution was beset with uncertainty. In doing so he was undeniably right.

There remains only the appellant's general argument that since it was acknowledged that the publicity of an adverse verdict in the Barclays (Asia) trial might prejudice his defence of the BMFL charges, the obvious course was to eliminate the risk by reversing the order of trials. Their Lordships must disagree. It was not the existence of the risk which mattered, so much as (a) the degree to which it enhanced the prejudice already created by the great publicity which all these matters had attracted in Hong Kong during the preceding years, and (b) the degree to which this additional risk could be neutralised by the trial Judge when the BMFL prosecution eventually arrived at a hearing (see *R. v. Kray* [1969] 53 Cr App R 412). The District Judge in Hong Kong was far better placed than this Board to make such a judgment, as part of his assessment of the situation as a whole. In effect, the District Judge was faced with a difficult choice between two unattractive alternatives. Their Lordships find it quite impossible to say that he was in error, and still less in the kind of error which would entitle a reviewing Court to intervene, by making the choice which he did. Although for the reasons stated they have thought it inappropriate to discuss in detail the reasoning of the Court of Appeal, their conclusion on this question of procedure is fortified by the fact that all four Judges in the local Courts were of the same opinion.

In the result, their Lordships have humbly advised Her Majesty that the appeal against the ruling of the Court of Appeal that it had no jurisdiction should be dismissed, and that the appeal against the judgment of Barnett J should also be dismissed. The appellant must pay the respondent's costs before their Lordships' Board.

Also found at [1992] 4 CLJ 1771